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No. 98-667

In the Supreme Court of the United States

OCTOBER TERM, 1998

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, D.C., U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, NEW YORK, AND DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, WASHINGTON, D.C.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Respondents, United States Department of Justice, the Department of Justice Office of the Inspector General, and the New York Immigration and Naturalization Service, argue that the first question presented, regarding the court of appeals' improper exercise of jurisdiction, does not warrant review by this Court because the court's jurisdictional decision is correct and does not conflict with the decisions of any courts. Resp. Br. 5. The Respondents also argue that

the second question presented, regarding the court of appeals' determination on the 5 U.S.C. 7114(a)(2)(B) issue, will "likely" be resolved by *NASA* v. *FLRA*, No. 98-369 (NASA), currently pending before this Court, and therefore the petition should be held pending the decision in that case. Resp. Br. 6, 10.

I. The Second Circuit Improperly Found Jurisdiction to Review the Merits of the Administrative Decision in This Case

Ignoring landmark precedent of this Court establishing the principles of administrative exhaustion and the proper role of reviewing courts vis-a-vis administrative agencies, the Respondents instead argue that their eschewing of exhaustion in this case is properly excused by the extraordinary circumstance of futility. As argued by the Federal Labor Relations Authority (Authority) in the petition for a writ of certiorari, the futility exception is not properly applicable in this case. Contrary to Respondents' argument (Resp. Br. 5), the Second Circuit's assumption of jurisdiction in this case conflicts with the decisions of this Court and those of other courts of appeals.

A. Futility Is Not Supported by Related Decisions of This or any Other Court

Section 7123(c) of the Federal Service Labor-Management Relations Statute (Statute)[1] provides that absent "extraordinary circumstances," a reviewing court shall not consider an "objection that has not been urged before the Authority." This administrative exhaustion requirement, found in various administrative agency

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[1]5 U.S.C. 7101-7135 (1994 & Supp. II 1996).

statutes,[2] has been interpreted to include circumstances where it would have been futile to raise the objection with the administrative agency. *See, e.g., National Labor Relations Board* v. *FLRA*, 2 F.3d 1190, 1195-96 (D.C. Cir. 1993) (The "patent futility" of urging an objection before the Authority may "constitute[] an extraordinary circumstance."). However, in recognizing that futility can be an extraordinary circumstance, courts have stressed it must be clearly and positively shown, *see Makar* v. *Health Care Corp. of Mid-Atlantic (Carefirst)*, 872 F.2d 80, 83 (4th Cir. 1989), and "should not lightly be presumed," *Washington Ass'n for Tel. and Children* v. *Federal Communications Comm'n*, 712 F.2d 677, 682 n.9 (D.C. Cir. 1983).

Here, the Second Circuit, relying on its *Overseas Education Association* v. *FLRA*, 961 F.2d 36, 38 (2d Cir. 1992) (*OEA*) decision,[3] found that it would have been futile for the Respondents to have filed exceptions with the Authority because the Authority had previously made clear its position that an Office of the Inspector General (OIG) investigator is a representative of the agency under 5 U.S.C. 7114(a)(2)(B). But in finding futility in this case, the Second Circuit has applied an analysis and reached a conclusion at variance with decisions of other circuits and this Court.

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[2]*See, e.g.*, 42 U.S.C. 1320a-7a (1994) (Social Security Act); 29 U.S.C. 660(a) (1994) (National Labor Relations Act); 30 U.S.C. 816(a)(1) (1994) (Federal Mine Safety & Health Act of 1977).

[3]In that case the Second Circuit applied the futility doctrine after concluding that the Authority had a "deeply rooted and well-documented" test for determining whether a bargaining proposal excessively interfered with the exercise of a management right. Although purporting to rely on its *OEA* precedent (Pet. App. 7a), the Second Circuit did not expressly find that the Authority's position was "deeply rooted and well-documented."

The Second Circuit ignores the fact that the futility exception is not "an excuse for failure to exhaust administrative remedies." *Health Equity Resources, Urbana, Inc.* v. *Sullivan*, 927 F.2d 963, 966 (7th Cir. 1991). Rather, the futility exception applies when "resort to administrative remedies is 'clearly useless.'" *Communications Workers of Am.* v. *AT & T*, 40 F.3d 426, 432 (D.C. Cir. 1994) (*CWA*) (quoting *Randolph-Sheppard Vendors of Am.* v. *Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986) (*Randolph-Sheppard*)). Because this exception is "'subject to abuse,'" *Randolph-Sheppard*, 795 F.2d at 105 (citation omitted), before a court reaches such a finding, the administrative agency must have both "evidenced a strong stand on the issue in question" and also shown "*an unwillingness* to reconsider the issue." *Id.* at 106 (emphasis added). Absent a "clear showing that an administrative agency has taken a hard and fast position that makes an adverse ruling a certainty," the exception does not apply. *Thetford Properties IV Limited Partnership* v. *U.S. Dep't of Hous. & Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990) (*Thetford*).

Asserting that there is no circuit conflict, the Respondents ignore the rigorous prerequisites necessary for application of the futility doctrine in every judicial circuit save the Second. Instead, the Respondents argue that the Second Circuit properly applied its own futility exception. Resp. Br. 6-7. However, the Second Circuit's application and the argument urged by Respondents "allow the futility exception to swallow the [administrative] exhaustion rule." *Thetford*, 907 F.2d at 450.

B. The Authority Had Not Indicated any Unwillingness to Consider Objections on This Question

The Second Circuit improperly concludes from the

Authority's clear articulation of its position on this issue that the Authority would be totally unreceptive even to the consideration of any objections. There is no support for this illogical assumption.

In the first place, though the Authority had long held that OIG personnel could be considered "representative[s] of the agency" within the meaning of section 7114 (a)(2)(B),[4] the Authority's position on this matter had recently been rejected by the United States Court of Appeals for the District of Columbia Circuit (*see United States Dep't of Justice* v. *FLRA*, 39 F.3d 361 (D.C. Cir. 1994)) causing the Authority to reevaluate its position on this question in *Headquarters, National Aeronautics & Space Administration, Washington, D.C. and National Aeronautics & Space Administration, Office of the Inspector General, Washington, D.C.*, 50 FLRA 601 (1995) (*Headquarters, NASA*). In that decision, the Authority reaffirmed that OIG personnel could properly be characterized as representatives of the agency, and went on to change course and conclude that the agency headquarters could be responsible for the statutory violations committed by their OIG personnel. *See Headquarters, NASA*, 50 FLRA at 620-21. This latter determination—holding the agency headquarters responsible for the violations of its OIG personnel—was applied for the first time in the case *sub judice*.[5] At the time of the Second Circuit's decision in this case, the Authority had not had even one opportunity to consider any objections to the agency headquarters determination reached in its *Headquarters, NASA* decision. From these facts the Second Circuit cannot properly conclude that it would have been futile for the Respondents to have filed objections with the Authority.

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[4]*See Department of Defense, Defense Criminal Investigative Serv.; Defense Logistics Agency and Defense Contract Admin. Servs. Region, New York*, 28 FLRA 1145 (1987), *enforced sub nom. Defense Criminal Investigative Serv.* v. *FLRA*, 855 F. 2d 93 (3d Cir. 1988).

[5]The Court has recently granted certiorari on this latter question as well. *See NASA*, 67 U.S.L.W. 3170 (U.S. Nov. 2, 1998) (No. 98-369).

In the second place, even if the Authority had a "predetermined policy" on this question, that would have been an insufficient justification for failure to exhaust administrative remedies. *See United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (*L.A. Tucker*). The Respondents attempt to distinguish this Court's *L.A. Tucker* decision by arguing that it dealt with an unpreserved question of procedural law, whereas the instant case concerns an unpreserved question on the merits. Resp. Br. 9. Contrary to Respondents' assertions, *L.A. Tucker* is clearly applicable to the case at hand. *See id.* at 37. Moreover, even if *L.A. Tucker* were distinguishable, the Respondents do not explain how the failure to preserve a question of procedural law, in that case, is not to be excused and denies a court jurisdiction, but ignoring all substantive and procedural prerequisites, in this case, is excusable and permits a court to exercise jurisdiction.

C. The Second Circuit's Finding of Futility Disregards Novel Issues in This Case that Had Never Been Presented to the Authority

Not only is the Second Circuit's futility standard unacceptably out of sync with decisions of this Court and those of other circuits, but the court below further erred by ignoring the fact that the Administrative Law Judge's decision under review in this case presented novel issues that had not been considered by the Authority. In its petition to the Court, the Authority pointed out these two novel issues—the criminal nature of the allegations in the case, a significant factor to the Second Circuit, and the finding of liability on the part of the local agency component. Pet. 18-19.

The Respondents argue that the novelty of these issues does not affect futility because neither of them

could have changed the outcome in this case. Resp. Br. 7-8. According to Respondents, the liability of the local agency component and the criminal aspect of the investigation were, in the final analysis, irrelevant to the Second Circuit's determinations in this case. As a threshold matter, the Respondents' arguments evince a failure to appreciate how the futility doctrine should be applied. Futility is not an after-the-fact, quality control device established for the purpose of evaluating whether a court's decision exceeded appropriate parameters in a given case. Rather, the futility doctrine operates to prevent a court from assuming jurisdiction except in cases where the agency's position is so entrenched that presenting arguments to the agency would be useless. *See CWA*, 40 F.3d at 432-33.

In this case, given the fact that neither of these issues had ever before been considered by the Authority, it is impossible to conclude that it would have been futile to administratively raise these questions. If proper procedures had been followed, the Authority would have been given the opportunity to evaluate and define whether, and under what circumstances, a local agency component may be liable when OIG personnel violate section 7114(a)(2)(B). Further, the Authority could have considered an issue specifically reserved in *Headquarters, NASA, i.e.*, how and when to apply the *Weingarten* right to interrogations conducted by agencies with government-wide, law enforcement responsibilities, such as the Department of Justice. 50 FLRA at 616 n.13. Moreover, the Respondents' contention that the criminal aspects of this investigation were "irrelevant" (Resp. Br. 8) is directly contradicted by the Second Circuit's express reliance on the fact that the employees were questioned about "serious criminal offenses." Pet. App. 15a.

D. Policy Considerations in This Case Strongly Militate for Exhaustion of Administrative Remedies

"In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992). The Second Circuit's decision reveals no such balancing of interests.[6] Instead, the agency in this case—the Department of Justice—either intentionally or inadvertently neglected to exhaust administrative remedies and, because of the Second Circuit's overly complacent application of the futility exception, was able to present objections to the court that neither it, nor any other litigant, had ever presented to the Authority. Aside from the Second Circuit's lenient approach to futility, the Respondents have offered no cogent practical or policy reason why well-recognized and long-established principles of administrative exhaustion, applicable to every other litigant in this country, should not be applied to the Department of Justice in this case.

The Second Circuit has essentially ruled that once an administrative agency has clearly decided an issue, even one about which several circuit courts of appeals are in active disagreement, aggrieved parties are relieved of

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[6]For example, nothing here suggests that "it would be unfair to penalize" a party for not exhausting administrative remedies because the party did not have adequate notice of the opportunity to pursue administrative remedies. *Bowen* v. *City of New York*, 476 U.S. 467, 482 (1986). Similarly, there is no countervailing interest to justify the court's finding of jurisdiction in this case, such as could occur in, for example, a criminal case in which "use of the exhaustion doctrine . . . can be exceedingly harsh." *McKart* v. *United States*, 395 U.S. 185, 197 (1969).

any statutory obligation to raise objections with the administrative agency. This rule applies even when the underlying decision implicates unique, subsidiary issues that the administrative agency has not addressed. Instead, aggrieved parties are entitled to ignore exhaustion procedures, refuse to comply with the administrative agency's order, and argue any objections they have with the agency's order in a court of appeals. On review of the merits of the agency's determination, that court of appeals may, *sua sponte*, establish its own interpretation of the agency's governing statute.[7]

Left undisturbed, the Second Circuit's decision establishes a dangerous precedent that will adversely affect other administrative agencies and the courts because it encourages the disregard of administrative exhaustion and the resolution of administrative disputes, in the first instance, by the federal courts.[8] The Second Circuit's decision is erroneous, has potential for a significant adverse impact, and is at odds with decisions of other courts of appeals and this Court. Certiorari is appropriate on this issue.

II. Comprehensive Resolution of the Issue of Whether an OIG Investigator Is a Representative of the Agency Is Essential

The goal of litigation of the second question presented in the Authority's petition is the comprehensive resolution of an issue of substantial importance to the

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[7]As noted in the petition, in this decision the Second Circuit established its own interpretation of section 7114(a)(2)(B) of the Authority's Statute and thus exceeded the judicial review authority provided in *Securities & Exchange Commission* v. *Chenery*, 332 U.S. 194, 196 (1947). Pet. 21-23.

[8]This adverse effect could be enormous with respect to large agencies having immense caseloads, such as the Social Security Administration (*see* note 2 *supra*).

federal labor-management relations community—whether an OIG agent is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B). In the Authority's view, and as discussed in the petition, there are issues raised in the Second Circuit's decision that a determination in *NASA* may leave unresolved. Pet. 25-26.

The Respondents request that the decision on this issue be held pending the Court's decision in *NASA*. Provided this issue is comprehensively resolved in *NASA*, the Authority interposes no objection to holding a determination on certiorari on this issue until after the Court has rendered a decision in *NASA*.

CONCLUSION

The petition for a writ of certiorari should be granted on the first question presented, and may be held on the second issue presented pending this Court's decision in *NASA*.[9]

Respectfully submitted,

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[9]The Solicitor General authorizes the filing of this Reply Memorandum by the Federal Labor Relations Authority.